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No. 92-1183

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN A. KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether videotapes that focus on the genitals and pubic areas of minor females may constitute "lascivious exhibition[s] of the genitals or pubic area" under 18 U.S.C. 2256(2)(E) even though those body parts are covered by clothing.

2. Whether the federal child pornography statute is unconstitutionally vague or overbroad if properly construed.

3. Whether petitioner had the requisite mental state to violate the federal child pornography statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 977 F.2d 815. The opinion of the district court denying petitioner's pretrial motion to dismiss the indictment is reported at 776 F. Supp. 174.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1992. The petition for a writ of certiorari was filed on January 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2252 (1988 & Supp. IV 1992) provides, in pertinent part:

(a) Any person who—

* * * * *

(2) knowingly receives * * * any visual depiction that has been mailed * * * in interstate or foreign commerce * * * if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * * * *

(4) either—

* * * * *

(B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed * * * in interstate or foreign commerce * * * if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

18 U.S.C. 2256 provides, in pertinent part:

For purposes of this chapter, the term—

* * * * *

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse * * *;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person.

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of knowingly receiving through the mail visual depictions of minors engaged in sexually explicit conduct and knowingly possessing such visual depictions, in violation of 18 U.S.C. 2252(a)(2) and (4) (1988 & Supp. IV 1992). He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed. Pet. App. 1-25.

1. Petitioner, who had previously been convicted of receiving child pornography through the mail, became the subject of a Customs Service investigation when Customs agents intercepted two pieces of mail sent to him. The first, from the Netherlands, contained advertisements for child pornography. The second, from France, was sent to a false address that petitioner used. In that second piece of mail, a company returned a check from petitioner, and advised petitioner to determine whether the videos he had ordered "conform to the laws of your country." Aug. 28, 1991, Tr. 20-30; GX 2.

In April 1991, Customs agents searched petitioner's apartment pursuant to a warrant. At that time, the agents seized the three videotapes on which this prosecution is based. The three videotapes, each of which is between one and one-half and two hours long, were compilations petitioner had made from videos sold by the Nather Company of Las Vegas. Pet. App. 3. Petitioner had obtained about 15 videos sold by Nather (for approximately $60 each)—with titles such as *Ripe and Tender*, *Young Flashers*, and

Sweet Young Things—and had copied selected portions of those videos onto his own tapes. Nov. 14, 1991, Tr. 18, 24.

A catalogue of Nather Company videotapes "featuring teen and pre-teen girls" was also found in petitioner's apartment. It described *Young and Tight*, one of the videos from which petitioner made his tapes, as "featuring about 20 young beauties, ages 8-14, performing baton twirling, majorette and gymnastics routines, plus our usual panty-flashing shots and tight young butts in short-shorts and bikinis." With respect to *Lollipops*, which is also excerpted on one of petitioner's tapes, the catalogue states that there is "an enchanting scene showing a dark-haired beauty of 11 letting us have a long, slow look up her dress to view her snow-white panties." In addition, *Lollipops* features "scenes of a thirteen year old in a leopard skin bikini with a magnificent ass that she puts on display for you as she walks back and forth slowly and teasingly." According to the Nather catalogue, *Early Adolescence*, which petitioner copied onto one of his own tapes, was made in response "to the many requests we had been receiving for tapes that had almost exclusively candid panty shots." The catalogue advised that "if you like undies on girls between the ages of 8 and 16, we suggest you order this rare tape today." Nov. 14, 1991, Tr. 4-5; GX 1. Nather's promotional materials also asserted that its tapes were "completely legal" because there was "no sex or nudity." See 776 F. Supp. at 179.

The Nather tapes consist mainly of repetitious sequences set to background music. The district court described them as follows: "In each vignette the subject of the video would strike various poses which

were obviously being directed by someone off-camera. Whenever a particular pose revealed the girl[']s underpants or the area surrounding her genitals, the camera would zoom in on the area. In the course of each vignette, more than a substantial amount of time was spent focusing in on these areas, as well as the girl's buttocks." 776 F. Supp. at 179. Petitioner's videotapes consist of a series of excerpts from the Nather tapes. They contain numerous sequences during which all that is visible on the screen is the portion of a young girl from her navel to her thigh. The girls are typically wearing bathing suits or leotards, or spreading their legs so that their panties are visible under a short skirt.

2. In 18 U.S.C. 2252, Congress made it a crime to transport, receive, distribute, or possess any visual depictions that involve "the use of a minor engaging in sexually explicit conduct." It defined "sexually explicit conduct" in 18 U.S.C. 2256(2)(E) to include "lascivious exhibition of the genitals or pubic area of any person." Based on the videotapes seized from his apartment, petitioner was charged with receiving and possessing child pornography, in violation of Section 2252.

Petitioner moved to dismiss the indictment. He did not dispute that the videotapes were "lascivious," 776 F. Supp. at 180 n.7, but he contended that they contained no "exhibition of the genitals or pubic area." The district court acknowledged that while "[t]he Nather tapes were fraught with instances of the camera zooming in on the area of the girl's genitals, * * * in every instance the girl's genitals were covered." *Id.* at 180. The court observed, however, that "[s]exually explicit conduct covers exhibitions of the genitals *or* pubic area." *Ibid.* Concluding that "the pubic area would appear to be the region of the

human anatomy in close proximity to the genitals," the court denied the motion to dismiss, because "the area in close proximity to the genitals, specifically the uppermost portion of the inner thigh area closest to the girl's genitals, was clearly exposed" in most of the videotaped materials. *Ibid.*

A bench trial followed. The government argued, Gov't C.A. Br. 29-38, that petitioner's videotapes constituted "lascivious exhibition[s] of the genitals or pubic area" under the test formulated in *United States* v. *Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd *sub nom. United States* v. *Wiegand*, 812 F.2d 1239, 1244 (9th Cir.), cert. denied, 484 U.S. 856 (1987). Petitioner contended, on the other hand, that the videotapes did not exhibit the children's genitalia or pubic areas, because the subjects wore underpants, swimsuits, or leotards. Nov. 14, 1991, Tr. 19-20. At the end of the trial, the district court found petitioner guilty on both counts.

3. The court of appeals affirmed. Pet. App. 1-25.

a. The court framed the principal question as "whether videotapes that focus on the genitalia and pubic area of minor females constitute an 'exhibition of the genitals or pubic area' under the federal child pornography laws * * * even though these body parts are covered by clothing." Pet. App. 2. At the outset, the court determined that the district court had erred by concluding that the pubic area includes the upper portion of the inner thigh. The court explained that "[t]he most widely accepted human anatomy treatises make clear that the pubic area is entirely above the genitals and not below or alongside that portion of the anatomy." *Id.* at 8, citing H. Gray, *Gray's Anatomy* 90-91 (30th ed. 1985), and *Dor-*

land's Illustrated Medical Dictionary 1533 (27th ed. 1988).[1]

The court of appeals, however, rejected petitioner's contention "that the genitals or pubic area must be unclad or nude, and fully exposed to the camera, before an exhibition may occur." Pet. App. 10. The court relied on the fact that the dictionary definition of "exhibit" is "to present to view," "to show publicly," or to "put on display in order to attract notice." *Id.* at 11, quoting *Webster's Third New International Dictionary, Unabridged* 796 (1976). The visual depictions in petitioner's videotapes, the court found, clearly put the genitals and pubic areas of the young girls " 'on display' as the camera focused for prolonged time intervals on close-up views of these body parts. Pet. App. 11. Additionally, 'the obvious purpose and inevitable effect of the videotape was to 'attract notice' specifically to the genitalia and pubic area. Applying the plain meaning of the word 'exhibition' leads to the conclusion that nudity is not a prerequisite for the occurrence of an exhibition." *Ibid.*

The court of appeals found support in the legislative history for its interpretation. An early draft version of the statute prohibited only nude depictions of children. Pet. App. 11. Because Congress omitted any reference to nudity in the legislation that was enacted, the court of appeals considered the change to be an indication of Congress's intention to "criminalize both clothed and unclothed visual images of a child's genitalia if they were lewd." *Id.* at 12.

b. The court of appeals held that its construction did not render the statute unconstitutionally vague

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[1] We agree with the court of appeals' conclusion that the inner thigh is not part of the pubic area.

or overbroad. The court explained that "[a]lthough our interpretation of an exhibition is expansive, the limiting principle in the statute is the requirement of lasciviousness." Pet. App. 19.

c. Finally, the court of appeals rejected petitioner's contention that the evidence showed that he lacked the requisite mental state to violate the federal child pornography statute because he claimed to have believed Nather's assertion that its tapes were "completely legal." See 776 F. Supp. at 179. The court of appeals noted that it previously had held that "a defendant simply must be aware of the general nature and character of the material and need not know that the portrayals are illegal." Pet. App. 23. In this case, the court concluded, there was no doubt that petitioner was aware of the nature of the material Nather sold. Nather's promotional materials claimed that its films featured "girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy," and added that "it's almost like seeing them naked (some say even better)."

SUMMARY OF ARGUMENT

I. Although it properly rejected petitioner's contention that nudity is an absolute requirement for coverage under the federal child pornography statute, the court of appeals nevertheless utilized an impermissibly broad standard for determining whether a videotape can be considered to be a lascivious "exhibition" of the genitals or pubic area of a child. In an admittedly "expansive" construction, the court of appeals held that "clothed exhibitions of the genitalia are proscribed" when "a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image

sexually arousing to pedophiles." Pet. App. 19, 13, 15.

We submit that neither the statutory language nor the legislative history will bear such an interpretation. In our view, the plain meaning of the statute requires a prohibited depiction to contain two elements that the court of appeals did not consider: (a) the material must include a *visible* depiction of the genitals or pubic area of the body (as distinguished from a depiction of the clothing covering those areas); and (b) the material must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer).

II. If the federal child pornography statute is properly construed, it is neither unconstitutionally overbroad nor unconstitutionally vague. This Court has upheld similar statutes against just such attacks on several prior occasions.

III. Petitioner's argument that the government failed to prove that he had the necessary mental state because he did not know that his videotapes were illegal was properly rejected by the court of appeals. Petitioner was completely aware of the nature of the contents of the materials and of the fact that they contain numerous depictions of under-age children. A mistake of law about the legality of those materials does not negate the mens rea necessary for a conviction.

IV. If the Court agrees with us that the court of appeals utilized an incorrect interpretation of the federal child pornography statute, we suggest that the proper course would be to vacate the judgment of conviction and remand for consideration under

the proper statutory standard. The relevant question on remand would be whether the evidence produced at trial was sufficient to support a general verdict of guilty under the correct legal standard.

ARGUMENT

I. THE VIDEOTAPES IN THIS CASE CONSTITUTE "LASCIVIOUS EXHIBITION[S] OF THE GENITALS OR PUBIC AREA" ONLY IF THOSE BODY PARTS ARE VISIBLE IN THE TAPES AND THE MINORS POSED OR ACTED LASCIVIOUSLY

1. The principal question in this case is whether petitioner's videotapes "exhibit" the genitals and pubic areas of young girls. We believe that, while the court of appeals was correct in holding that complete nudity is not absolutely required for a depiction to constitute a forbidden "exhibition," the court erred in holding that simply focusing on the midsection of a clothed body may constitute an "exhibition" of the unrevealed body parts beneath the garments. Rather, in our view, an "exhibition" requires both that the depiction in question focus on those body parts and that it render them visible in some fashion. While visibility does not necessarily require full visual exposure, it requires at least that the body parts themselves be discernible either through or beneath the clothing so that it can fairly be said that the depiction is an "exhibition" of the body parts rather than a depiction of clothed areas of the body.

As the opinion below points out, Pet. App. 11, the phrase "lascivious exhibition of the genitals or pubic area" entered the statute in this case as a replacement for an earlier draft provision that would have prohibited depictions of child "nudity, which

nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." S. 1011, 95th Cong., 2d Sess. (1977). Objection was made to this language on the ground that it was excessively vague. The phrase "lewd exhibition of the genitals or pubic area" was substituted at the suggestion of the Department of Justice.[2] That change was made in order more clearly to delineate "what *types of nude portrayals* of children were intended to be encompassed within this definition." *Protection of Children Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 77-78 (1977) (emphasis added).

Given this legislative history, we believe that the statute must be read to require at least some substantial degree of genital or pubic visibility in order for a depiction to constitute a "lascivious exhibition of the genitals or pubic area." This interpretation is strongly supported, we think, by Congress's choice of the term "exhibition" of the genitals or pubic area to describe the prohibited depictions. The most natural meaning of that term is that one of those parts of the body—rather than the clothing covering them —must be "on exhibit." As petitioner's amici state, Br. 10, "it would be a strange art 'exhibition' if all the pictures were hidden by cloth covers."

At the same time, some depictions make the genitals or pubic area visible even though, as a technical matter, those body parts are not nude. Acceptance

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[2] "Lascivious" was substituted for "lewd" by Congress in 1984 without any intent to change the meaning of the statute. See p. 15 note 6, *infra*.

of petitioner's argument that a videotape depiction cannot constitute a "lascivious exhibition of the genitals or pubic area" unless those areas are completely uncovered in all respects might therefore undermine the purposes of the statute in some cases. For example, a child dressed in a transparent or nearly transparent garment is not technically nude but a depiction of the child that focuses on the midsection would nevertheless "exhibit" the child's genitals and pubic area. In addition, displays of a child's pubic area under clothing that is so thin and tight as to reveal completely the contours of the genitals would not technically be nude displays, but could, we think, be considered to be "exhibitions" under the statute.[3] In our view, the Justice Department's reference to "nude portrayals" during the drafting of this statute does not preclude interpreting it in this limited fashion, although it rules out the court of appeals' more expansive construction.

2. There is a second reason why we believe the court of appeals did not employ the correct interpretation of the statute. Section 2252(a) covers depictions involving "the use of *a minor engaging in* sexually explicit conduct." Section 2256(2), in turn, defines the "sexually explicit conduct" of minors to which the statute applies as including "lascivious

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[3] We recognize that a requirement of visibility, even if the body parts are covered, is probably easier to apply in most cases with respect to boys than girls. Indeed, as petitioner's amici acknowledge, some state statutes explicitly prohibit depictions of the "covered male genitals in a discernibly turgid state." See Amicus Br. 18 n.10. But the genitals and pubic areas of girls may also be visible in some circumstances even if the girls are not completely nude.

exhibition[s]."[4] Depictions therefore come within the statute only if they show minors engaged in the conduct of lasciviously exhibiting their (or someone else's) genitals or pubic areas. See, *e.g.*, *New York* v. *Ferber*, 458 U.S. 747, 764 (1982): "[T]he nature of the harm to be combatted requires that the * * * offense be limited to works that visually depict *sexual conduct by children* below a specified age" (emphasis added). Perhaps because petitioner did not raise this issue clearly, neither the district court nor the court of appeals below addressed the question of whether the minors who appear in these videotapes can be said to have been acting or posing lasciviously, as the statute requires.

3. The court of appeals has thus applied an incorrect standard regarding whether the materials in this case come within the purview of the federal child pornography statute. We nevertheless believe that the materials in this case may in fact fall within the statute when judged according to the correct standard. In these circumstances, we think the appropriate course is for the Court to vacate the judgment below and remand the case for reconsideration under the statutory standard that we have described, *i.e.*, one requiring (a) genital or pubic area visibility, and (b) lascivious posing or acting on the part of the minors whose bodies are exhibited. See Part IV, *infra*.

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[4] There is no basis for arguing that any of the other statutorily defined categories of "sexually explicit conduct" ("sexual intercourse," "bestiality," "masturbation" or "sadistic or masochistic abuse") applies in this case.

II. CONSTRUING "LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA" NOT TO REQUIRE COMPLETE NUDITY DOES NOT RENDER THE STATUTE UNCONSTITUTIONALLY VAGUE OR OVERBROAD

Petitioner contends that, absent a strict nudity requirement, the federal child pornography statute is unconstitutionally vague and overbroad. Br. 35-40. This Court has, however, already concluded in *New York* v. *Ferber*, 458 U.S. 747 (1982), that a statute nearly identical to the federal child pornography statute is not impermissibly overbroad. Nor is the federal statute, properly construed, unconstitutionally vague.

1. The First Amendment overbreadth doctrine is one of the few exceptions to the traditional principle that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, 458 U.S. at 767. The Court has recognized that the overbreadth doctrine is "strong medicine" that should be employed "only as a last resort." *Id.* at 769, quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973).

In *Ferber*, the Court held that a New York child pornography statute that prohibited "lewd exhibition of the genitals," see 458 U.S. at 751, was not substantially overbroad. Noting that the court of appeals "was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute," the Court nevertheless concluded that because there was no showing that "these arguably

impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach," the statute did not suffer from substantial overbreadth. *Id.* at 773. To the extent there was any overbreadth at all, the Court reiterated its statement in *Broadrick* that the overbreadth problem could be cured by a case-by-case analysis of fact situations to which the statute could not be applied. *Id.* at 773-774, quoting *Broadrick* v. *Oklahoma*, 413 U.S. at 615-616.[5]

Thus, this Court has already rejected an overbreadth challenge to a state statute similar to the statute at issue here.[6] If the federal statute is construed as we have suggested in Part I of this brief, the same conclusion follows here. Properly construed, a "lascivious exhibition of the genitals or pubic

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[5] In *Osborne* v. *Ohio*, 495 U.S. 103 (1990), the Court rejected a similar overbreadth challenge to a state child pornography statute that prohibited the possession of nude photographs of minors. The Ohio Supreme Court had construed the statute to prohibit such photographs only where the nudity "constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." See *id.* at 113. So construed, this Court held that the statute "plainly survives overbreadth scrutiny," observing that the limiting language prevented prosecution for possession of innocuous photographs of naked children, and that the language was similar to that upheld against an overbreadth challenge in *Ferber*. *Id.* at 113-114.

[6] "Lascivious" and "lewd" are synonymous. *United States* v. *Weigand*, 812 F.2d 1239, 1243 (9th Cir.), cert. denied, 484 U.S. 856 (1987). Congress replaced "lewd" with "lascivious" in 1984 because "lewd" had been associated with obscenity, and Congress wanted "to make it clear that an exhibition of a child's genitals does not have to meet the obscenity standard to be unlawful." 130 Cong. Rec. 7196 (1984) (Sen. Specter).

area" of children is not protected speech. *New York* v. *Ferber*, 458 U.S. at 747. Justice Brennan made exactly that point in dissent in *Massachusetts* v. *Oakes*, 491 U.S. 576 (1989), which involved a challenge to a child pornography statute that broadly proscribed child "nudity." He stated that there was a "simple corrective[]" to the overbreadth problem caused by the statute—it could have been amended to proscribe "lewd exhibition of the genitals." *Id.* at 598. That showed "the ease with which its unconstitutional applications might be eliminated." *Ibid.*

Even if it were to be assumed that the federal child pornography statute is capable of reaching some protected speech, the statute is nevertheless not unconstitutionally overbroad. If there are any "lascivious exhibition[s]" of children's genital and pubic areas that are protected expression, there certainly cannot be many. At the same time, the statute unquestionably reaches a broad range of *un*protected expression, including lascivious depictions of naked children. Any arguably impermissible applications of the statute amount to, at most, no more than "a tiny fraction of the materials within the statute's reach." *New York* v. *Ferber*, 458 U.S. at 773, and those cases can be dealt with if and when they arise. Thus, just as the Court held in *Ferber* with respect to the similar New York statute that was at issue there, this is "the paradigmatic case of a * * * statute whose legitimate reach dwarfs its arguably impermissible applications," *ibid.*, and the overbreadth challenge therefore fails.[7]

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[7] In *Ferber*, the Court added that it would not "assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the pro-

2. Nor does the construction we propose render the statute unconstitutionally vague. It will not, we submit, be difficult to determine whether pictures "exhibit" the genitals or public areas if that term is restricted to visible depictions of those areas. In addition, the Court has already held in both *Miller* v. *California*, 413 U.S. 15 (1973), and *Ferber* v. *New York*, *supra*, that a requirement of lewdness or lasciviousness as applied to exhibitions of the genital area does not introduce an element of unconstitutional vagueness.

III. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT PETITIONER HAD THE NECESSARY MENTAL STATE TO VIOLATE THE CHILD PORNOGRAPHY STATUTE

Petitioner also argues that the government failed to prove that he had the necessary mental state to violate the federal child pornography statute, because he allegedly did not know that his videotapes were illegal and he relied on Nather's claims that its products were legal. Br. 31-35. The court of appeals correctly found, however, that the evidence was suffi-

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scription on 'lewd exhibition[s] of the genitals.'" 458 U.S. at 773. With respect to a federal statute, the danger of overly expansive interpretation is more limited, since this Court has ultimate control of the construction of federal statutes. Unlike the interpretation adopted by the court of appeals below, the construction of the term "exhibition" that we propose—which requires that the genitals or pubic area be uncovered or, if covered, be sufficiently revealed by the covering to constitute a visible display—is not an expansive interpretation of the term. In addition, the reach of the federal statute is also substantially restrained by the requirement that the minor involved engage in "lascivious" conduct.

cient to show that petitioner had the requisite criminal intent.

This Court made clear in *New York* v. *Ferber* that child pornography laws, like obscenity laws, must include "some element of scienter on the part of the defendant." 458 U.S. at 765, citing *Smith* v. *California*, 361 U.S. 147 (1959), and *Hamling* v. *United States*, 418 U.S. 87 (1974). The federal child pornography statute requires proof that a defendant "knowingly" transported or shipped, or "knowingly" received or possessed, visual depictions of a minor engaging in "sexually explicit conduct." 18 U.S.C. 2252. The courts have held that the mens rea requirement in the statute is satisfied if a defendant is shown to know the nature and contents of the materials. See *United States* v. *Osborne*, 935 F.2d 32, 34 & n.2 (4th Cir. 1991); *Rodriguez* v. *Clark Color Laboratories*, 921 F.2d 347, 349 (1st Cir. 1990); *United States* v. *Duncan*, 896 F.2d 271, 277-278 (7th Cir. 1990); *United States* v. *Moncini*, 882 F.2d 401, 404 (9th Cir. 1989); *United States* v. *Brown*, 862 F.2d 1033, 1036-1038 (3d Cir. 1988); *United States* v. *Johnson*, 855 F.2d 299, 306 (6th Cir. 1988). There is no question that petitioner knew the nature and contents of the materials he ordered.[8]

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[8] The Ninth Circuit recently held 18 U.S.C. 2252 unconstitutional on its face because of that court's finding that the statute contains no requirement that the defendant have knowledge that the persons depicted in the materials are minors. *United States* v. *X-Citement Video*, 982 F.2d 1285 (1992). Petitioner, however, does not argue that he was unaware that the girls on his videos were minors. Indeed, any such claim would be implausible, in light of Nather's advertising—which, for example, advised that "if you like undies on girls between the ages of 8 and 16," order *Early Adolescence*, Nov. 14,

In essence, petitioner claims that he made a mistake of law, and that no reasonable person could have expected that depictions of the type he possessed would be held to fall within the definition of child pornography. But ignorance of the law or a mistake of law is ordinarily no defense to criminal prosecution. *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). This Court has specifically applied that rule to the federal obscenity statutes, *Hamling* v. *United States*, 418 U.S. 87, 123 (1974), and the reasoning of that decision applies equally to the closely related context of child pornography. See Pet. App. 22-23; see also *United States* v. *Moncini*, 882 F.2d at 405-406. As this Court explained in *Hamling*, it is sufficient to show that the defendant had knowledge of the nature of the materials; he need not be shown to have known they were illegal.[9] In light of the explicit descriptions of the materials petitioner ordered, and the finding of the courts below that he was definitely aware of the nature of the materials, "he must bear the risk of the potential illegality of his conduct." *United States* v. *Moncini*, 882 F.2d at 405.

Petitioner also argues that he could rely on the representations of the Nather Company that the video-

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1991, Tr. 4-5; GX 1—and petitioner's own notes on the boxes for the videos—which, for example, noted that *Ripe and Tender* showed a "10 yr. old in sexy swimsuit poses," Aug. 28, 1991, Tr. 46; GX 3.

[9] Petitioner relies, Br. 33, on *United States* v. *United States District Court for Central Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988), in which the court of appeals held that a defendant charged under the federal child pornography statute was entitled to an affirmative defense based on a reasonable mistake of age. Such a claim, however, is not a mistake of law defense. Rather, it tends to negate a defendant's knowledge of the nature and content of the materials.

tapes they were advertising were legal. The court of appeals correctly answered that contention by observing that "relying on Nather's disclaimer is tantamount to asking a hard core pornographer for legal advice as to whether the material he earns a living by selling is legal. * * * If anything, the need to profess legality should have alerted [petitioner] to the films' dubious legality." Pet. App. 24.

IV. THIS CASE SHOULD BE REMANDED SO THAT THE COURT OF APPEALS CAN ASSESS THE SUFFICIENCY OF THE EVIDENCE UNDER THE PROPER LEGAL STANDARD

Although we believe that petitioner's videotapes may be deemed to be unlawful under what we view as the correct statutory standard, we recognize that the court of appeals did not employ that standard and that the court reviewed petitioner's conviction under a more expansive test. Nor did either of the parties below address the application of the correct standard to the facts of this case. For that reason, we believe that, if the Court agrees that an incorrect construction of the statutory phrase was used below, the appropriate disposition is to remand the case to the court of appeals for application either by that court or the district court of the correct standard to the facts of this case.

As we have noted above, the correct construction of the phrase "lascivious exhibition of the genitals or pubic area" by a minor poses two separate issues under the child pornography statute. The first is the question that was the principal focus of the litigation in the lower courts—whether the videotapes constituted a "visual depiction" of "sexually explicit conduct." See 18 U.S.C. 2252(a)(2)(B) (as to the re-

ceipt count), 2252(a)(4)(B)(ii) (as to the possession count). The second issue involves an element of the offense that was not featured in the lower court proceedings—whether the production of the videotapes involved the use of minors engaging in "sexually explicit conduct" through a "lascivious" exhibition of their genitals or pubic areas. 18 U.S.C. 2252(a)(2)(A) (as to the receipt count); 18 U.S.C. 2252(a)(B)(i) (as to the possession count). The court of appeals should be afforded the opportunity to determine whether the resolution of those issues, if appropriately preserved for review, would be affected by the legal standard for determining whether the conduct depicted in petitioner's videotapes constituted "lascivious exhibitions of the genitals or pubic area" by a minor within the meaning of the statute.[10]

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[10] The court of appeals held that petitioner waived his right to raise issues he presented in his post-trial motion for a judgment of acquittal, because that motion was untimely filed. See Pet. App. 7-8. Although the court of appeals further stated that petitioner's failure to file a timely motion for a judgment of acquittal barred him from challenging the sufficiency of the evidence except for plain error, *id.* at 20, we believe the court was mistaken in that regard. At the bench trial before the district court, petitioner argued in favor of a judgment of acquittal, raising the points he subsequently raised before the court of appeals. Because the trial court was sitting as the finder of fact, it was not necessary for petitioner to file a separate motion at that time under Rule 29, Fed. R. Crim. P., to preserve his right to challenge the sufficiency of the evidence on appeal. See *United States* v. *Rosas-Fuentes*, 970 F.2d 1379, 1381 (5th Cir. 1992); *United States* v. *Whitlock*, 663 F.2d 1094, 1097 n.24 (D.C. Cir. 1980); *United States* v. *Hon*, 306 F.2d 52, 54 (7th Cir. 1962); *Hall* v. *United States*, 286 F.2d 676, 677 (5th Cir. 1960), cert. denied, 366 U.S. 910 (1961). Thus, while petitioner's failure to file a timely post-verdict motion for a judgment of acquittal barred him from obtaining

There is another issue regarding the appropriate disposition of this case that warrants comment. As we have noted, the court of appeals affirmed petitioner's convictions on a ground different from the one articulated by the district court in its pretrial order on petitioner's motion to dismiss the indictment. The district court denied the motion to dismiss on the ground that the inner portion of the upper thigh is part of the "pubic area" and that petitioner's videotapes included a number of depictions of that area; the district court therefore did not find it necessary to determine whether the genitals or pubic area had to be uncovered in order to constitute "lascivious exhibitions" within the meaning of the statute. The court of appeals rejected that analysis, but held that the motion to dismiss was nonetheless properly denied, because the statute applies to covered as well as uncovered body parts.

Although the district court based its order on the motion to dismiss on an erroneous legal theory, the court did not indicate at trial that it was applying the same theory in finding petitioner guilty. In fact, the court rejected defense counsel's suggestion to that effect, explaining that it regarded the disposition of the motion to dismiss and the guilty verdict after trial as quite separate matters. See Feb. 13, 1992, Tr. 11-12.

Because petitioner did not ask the district court to find the facts specially, see Fed. R. Crim. P. 23(c), it cannot be assumed that the district court's legal

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review of the merits of that motion, it did not bar him from obtaining review of the denial of his request for an acquittal, made at trial after all of the evidence had been submitted. See Nov. 14, 1991, Tr. 14-20.

error in the order denying the motion to dismiss infected the general verdict of conviction. The court of appeals' task in reviewing that general verdict therefore was (and, on remand, will continue to be) simply to determine whether the evidence was sufficient, under the correct legal standard, to support a general verdict of guilty.[11]

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the court of appeals for further proceedings.

Respectfully submitted.

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[11] See *United States* v. *Musser*, 873 F.2d 1513, 1519 (D.C. Cir. 1989); *United States* v. *Hernandez-Salazar*, 813 F.2d 1126, 1130 (11th Cir. 1987); *United States* v. *Gant*, 691 F.2d 1159, 1163 (5th Cir. 1982); *United States* v. *Ochoa*, 526 F.2d 278, 1282 n.6 (5th Cir. 1976); *McClain* v. *United States*, 417 F.2d 489, 492 (9th Cir. 1969); 8A James Wm. Moore, *Moore's Federal Practice* ¶ 23.05[2] (2d ed. 1992); see generally *Cesario* v. *United States*, 200 F.2d 232 (1st Cir. 1952) (a request for special findings is the proper procedure by which a defendant may preserve a question of law for purposes of appeal).

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